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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: MAY 03 2011 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal.[1] The appeal will be summarily dismissed as abandoned.

The petitioner is a telephone systems distribution company. It seeks to employ the beneficiary permanently in the United States as a controller pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (ETA Form 9089), approved by the United States Department of Labor (DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on September 18, 2006. The proffered wage as stated on the ETA Form 9089 is $40.58 per hour ($84,406.40 per year).

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[1] The United States Citizenship and Immigration Services (USCIS) records show that while the instant appeal is pending with the AAO, another company filed a Form I-140 immigrant petition [redacted] on behalf of the instant beneficiary based on another approved labor certification. The petition was filed on February 22, 2011 and approved by the director of the Nebraska Service Center on February 28, 2011.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

In reviewing documentation in the record and evidence submitted on appeal, this office has found that the evidence in the record cannot establish the petitioner's continuing ability to pay the proffered wage from the priority date to the present, that the petitioner provided two addresses other than the address of intended employment on the ETA Form 9089, and therefore, it seems that the petitioner intends to employ the beneficiary outside the area of intended employment stated on the ETA Form 9089, and that the petitioner provided inconsistent information about the number of its employees on the petition with the one on the ETA Form 9089. Pursuant the regulation at 8 C.F.R. § 103.2(b)(8), the AAO serviced the petitioner a request for evidence (RFE) on August 6, 2010 and October 26, 2010 respectively. The petitioner was provided 84 days (twelve weeks) and 45 days to provide a response to the director's request for evidence. Three additional days were provided because the request for evidence was sent to the petitioner by mail. The responses were due on November 1, 2010 and December 13, 2010 respectively, including the additional three days. The AAO has not received any correspondence from the petitioner or its counsel to respond the RFEs as of this date, more than three months after the deadline established by regulations.

The regulation at 8 C.F.R. § 103.2(b)(8) states the following:

> Except as otherwise provided in this chapter, in other instances where there is no evidence of ineligibility, and initial evidence or eligibility information is missing or [USCIS] finds that the evidence submitted either does not fully establish eligibility for the requested benefit or raises underlying questions regarding eligibility, [USCIS] shall request the missing initial evidence, and may request additional evidence. . . . In such cases, the applicant or petitioner shall be given 12 weeks to respond to a request for evidence. Additional time may not be granted.

Additionally, the regulation at 8 C.F.R. § 103.2(b)(13) states the following: "*Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied." The regulations are clear that failure to respond to a request for evidence *shall* be considered abandoned and denied. In the RFEs, this office also clearly notifies that if the petitioner chooses not to respond, the AAO will dismiss the appeal without further discussion.

The response to the RFEs was due on December 13, 2010. As of that date the beneficiary's W-2 forms or other documentary evidence showing the petitioner paid the beneficiary a full or partial

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[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

proffered wage, the petitioner's annual reports, federal tax returns or audited financial statements for all the relevant years requested by this office in the RFEs should have been available. However, the petitioner did not submit the requested documents, nor did counsel explain why these requested documents were not submitted. In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). Although specifically and clearly requested by this office in the two RFEs, the petitioner declined to provide any requested documents. The requested documents would have demonstrated the amount the petitioner paid to the beneficiary during the relevant years, the net income or net current assets the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. These documents would also have demonstrated that the job offer the petitioner extended to the beneficiary was and has been *bona fide* and realistic from the priority date to the present. Without these requested documents, the AAO cannot determine whether the petitioner has established its continuing ability to pay the proffered wage and whether the job offer is a *bona fide* one and thus the petitioner has complied with the labor certification regulations. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). The AAO's RFEs also clearly notified the petitioner that the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition, and that the AAO will be unable to substantively adjudicate the appeal without a meaningful response to the line of inquiry se forth in the request for evidence.

Therefore, the instant appeal must be dismissed as abandoned for failure to provide a response to the requests for evidence, and the director's decision denying the petition should be affirmed.

ORDER: The appeal is dismissed.